IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1127 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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ANIL @ TAKLO MANILAL AGRAWAL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 1127 of 2001

MR HR PRAJAPATI for Petitioner No. 1

Mr. H.L. Jani, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 24/07/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Prajapati for the petitioner and the learned AGP Mr. Jani for the respondents. In this petition under Article 226 of the

the Constitution of India, the petitioner has challenged the impugned order of detention dated 2.1.2001 passed by the detaining authority whereunder the petitioner has been ordered to be detained at the Porbandar Jail as Class II detenu. According to the grounds of detention communicated to the petitioner under section 9(1) of the Gujarat Prevention of Anti Social Activities Act, in all, one offence at CR No. 5307 of 2000 has been registered against the petitioner under the Bombay Prohibition Act dated 24.12.2000. The statements of the secret witnesses as recorded on 30.12.2000 were verified by the detaining authority on 1.1.2001 and the detaining authority has, as per the grounds of detention, noted two unregistered offences against the petitioner dated 14.12.200 and 20.12.200 Looking to the grounds of detention at the time of passing of the detention order, the petitioner was under police remand. In the ground of detention, the detaining authority has observed that the petitioner was in police remand and after the completion of remand period, the petitioner may approach the court concerned and may be released on regular bail and may continue to indulge in the similar illegal and anti social activities endangering maintenance of public order but at the time of passing the impugned order of detention, there was no material available with the detaining authority to form such conclusion. No bail application was preferred by the petitioner at that time for his being enlarged on bail.

2. Learned advocate Mr. Prajapati has raised various contentions while challenging the impugned order of detention. According to him, two contentions are enough to vitiate the impugned order of detention. He has submitted that at the time of passing the impugned order of detention, the petitioner was in judicial custody by way of remand and while he was in remand, statements of two witnesses said to have been recorded on 30th December, 2000 and the same were verified on 1.1.2001 and on the very next date, the impugned order of detention was passed on 2nd January, 2001. Therefore, according to him, the detaining authority has exercised the powers mechanical and in a routine manner which has vitiated the subjective satisfaction of the detaining authority. According to him, the claim made by the detaining authority under section 9(2) of the PASA Act is not genuine and bonafide and the non disclosure of the names and addresses of the witnesses under the pretext of privilege under section 9(2) has deprived the detenu of his right to make an effective representation under Article 22(5) of the Constitution of India. According to him, while claiming privilege under section 9(2) of the

PASA Act, it is the duty of the detaining authority to take extra care by verifying the genuineness of such statements by way of independent inquiry; detaining authority is also required to consider the back ground of the detenu, his past history, seriousness of the offences and other relevant factors before claiming privilege u/s.9(2) of the PASA Act. He has submitted that on 1.1.2001, statements of the secret witnesses were verified by the detaining authority and on the very next date i.e. 2.1.2001, impugned order of detention has been passed by the detaining authority in mechanical and routine exercise of the powers without application of mind and, therefore, according to him, the impugned order of detention is required to be quashed and set aside. He has relied upon the following decisions:

1. Ranubhai Bhikhabhai Bharwad (Vekaria) versus State of Gujarat reported in 2000(3) GLR page 2696.
2. Ramesh Yadav versus District Magistrate and another (supra) reported in 1985 (4) SCC 232

3. Amrutlal and others versus Union of India reported in 2000(1) SCC 341.

4. Rivadeneyta Ricardo Augustin versus Government of the National Capital Territory of Delhi and others reported in 1994 SCC (Cri) 354.
5. 1994(1) GLR page 761.

Learned AGP Mr. Jani has supported the impugned order of detention and has submitted that there is no bar in passing the order of detention of a person while in judicial custody. Therefore, according to Mr. Jani, the impugned order of detention has rightly been passed by the detaining authority and, therefore, this Court should not interfere with the same and therefore, this petition is required to be dismissed.

I have considered the arguments of the learned advocates for the respective parties. I have considered the contentions raised by the learned advocate Mr. Prajapati that at the time of passing of the order of detention, the petitioner was in judicial custody. I have also considered the next contention raised by Mr. Prajapati about non application of mind on the part of the detaining authority in passing the impugned order of detention. I have also considered the contention of Mr. Prajapati that the claim of privilege u/s.9(2) of the PASA Act is not genuine and bonafide and the right of the

detenu to make an effective representation has been adversely affected.

In case of Ramesh Yadav v. District Magistrate and another (supra), the apex court has observed as under:

"6. On a reading of the grounds, particularly the paragraph which we have extracted above, it is clear that the order of detention was passed as the detaining authority was apprehensive that in case the detenu was released on bail, he would again carry on his criminal activities in the area. If the apprehension of the detaining authority was true, the bail application had to be opposed and in case bail was granted, challenge against that order in the higher forum had to be raised. Merely on the ground that an accused in detention as an under trial prisoner was likely to get bail an order of detention under the National Security Act would not ordinarily be passed. We are inclined to agree with counsel for the petitioner that the order of detention in the circumstances is not sustainable and is contrary to the well settled principles indicated by this Court in a series of cases relating to preventive detention. The impugned order has therefore, to be quashed."

In light of the said decision, considering the facts of this case, there is no observations made by the detaining authority in the grounds of detention that any bail application has been filed by the petitioner in respect of the offences registered against him. There is no averment to that effect and there was no material with the detaining authority to have the reasonable apprehension of the petitioner's release on bail and to indulge in the same activities again after release on bail.

In case of Rivadeneyta RIcardo Augustin (supra), the apex court has held as under in para 4 :

"4. Though several grounds are urged in support of the writ petition by Shri Ram Jethmalani, learned counsel for the petitioner, it is not necessary to refer to all of them except one of which, in our opinion, merits acceptance. It is submitted that on the date the order of detention was made the petitioner was in judicial custody. The bail petitions filed by

him were dismissed finally on June 9, 1992. He did not move any bail application thereafter. No bail application was pending on August 18, 1992. There was no other circumstance indicating that the petitioner would be released from custody. In these circumstances, there was no material before the authority to believe that there was a real possibility of the petitioner being enlarged on bail or being released and that it is necessary to detain him to prevent him from engaging in prejudicial activity. It is pointed out that according to the counter, proposal for the detention was sent to the Administrator on May 22, 1992 but the authority passed the order only on August 18, 1992 without apprising himself of the fact situation prevailing in the middle of August 1992. Reliance is placed upon two decisions of this court in Kamarunnisa v. Union of India and Hawabibi Sayed Hanif v. L. Hmingliana. In the first case the principle relied upon by the learned counsel, is stated in the following words : (SCC pp.138-39)

'The decisions of this court to which our attention was drawn by the learned counsel for the petitioners lay down in no uncertain terms that detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty. We will now consider the case-law in brief.

In vijay Narain SIngh this COurt stated that the law of preventive detention being a drastic and hard law must be strictly construed and should not ordinarily be used for clipping the wings of an accused if criminal prosecution would suffice. So also in Ramesh Yadav v. District Magistrate, Itah, this court stated that ordinarily a detention order should not be passed merely on the ground that the detenu who was carrying on smuggling activities was likely to be enlarged on bail. In such cases the proper course would be to oppose the bail application and if granted, challenge the

> order in the higher forum but not circumvent it by passing an order of detention merely to supersede the bail order. In Suraj Pal Sahu v. State of Maharashtra, the same principle was reiterated. in Binod Singh v. District Magistrate, Dhanbad, it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. There must be cogent material before the officer passing the detention order for inferring that the detenu was likely to be released on bail. This inference must be drawn from material on record and must not be the ipse dixit of the officer passing the detention order. Eternal vigilance on the part of the authority charged with the duty of maintaining law and order and public order is the price which the democracy in this country extracts to protect the fundamental freedom of the citizens. This Court, therefore, emphasized that before passing a detention order in respect of the person who is in jail the concerned authority must satisfy himself and that satisfaction must be reached on the basis of cogent material that there is a real possibility of the detenu being released on bail and further if released on bail the material on record reveals that he will indulge in prejudicial activity if not detained. "

In case of Amratlal and others versus Union of India (supra), the apex court has observed that while passing the order of detention, subjective satisfaction of the detaining authority is required to be established from the record. If the detenu is already in jail, then, the detaining authority must be satisfied on the basis of the available cogent material about likelihood of the detenu being released on bail and not merely about likelihood of his moving an application for bail. In absence of such subjective satisfaction, order of detention cannot sustain. Therefore, in view of the observations made by the apex court and looking to the facts and circumstances of the case, there is no observation made by the detaining authority in the

grounds of detention that there was application filed by the petitioner for his being released on bail in respect of the offences registered against the petitioner under the Bombay Prohibition Act.

There was no material before the detaining authority to have some reasonable apprehension about the petitioner to be released on bail. Therefore, considering these facts of the case, according to my opinion, the detaining authority has not applied mind properly. It amounts to non application of mind. In view of such non application of mind on the part of the detaining authority, subjective satisfaction is not established, looking to the facts of the present case.

However, learned advocate Mr. Jani has relied upon the decision of the division bench of this court reported in 1988 (2) GLH 475 in case of Nasimbanu. Now, this decision is in respect of lesser drastic remedy of cancellation of bail and the division bench of this court has held that the non consideration of this aspect of cancellation of bail as a lesser drastic remedy would not amount to non application of mind. Thus, the facts of the present case are different. Therefore, this decision is not helpful to the State. However, Mr. Jani has also relied upon the decision of the full bench of this court in special civil application no. 9579 of 2000 dated 4.5.2001. In para 41, Full Bench of this Court has considered the decision of the apex court in case of Amratlal and another versus Union Government (supra). The observations made by the full bench are that this decision shows that the detention order can be passed even though the detenu is in judicial custody if there is cogent material to indicate that he is likely to be released on bail. There is no dispute on this legal proposition that while the detenu is in judicial custody, order of detention can be passed but one aspect is also required to be kept in mind that there must be some cogent evidence to indicate that the detenu is likely to be released on bail and in absence of such material, subjective satisfaction cannot be said to have been established. In the instant case, such subjective satisfaction has not been established. Therefore, this decision of the full bench and also the decision of the division bench in 1988 (2) GLH 475 are not helpful to the respondent State in the facts and circumstances of the present case.

I have also considered the decision reported in 2000(3) GLR page 2696. Relevant observations are as under:

"After referring to Kalidas C. Kahar v. State of Gujarat, 1993 (2) GLR 1659, the Court observed:

The statements of the three witnesses in the instant case which were recorded before the [police inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have been made on 27th August, 1999 and it is clear from the record that it was on 29th August 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August, 1999 and on 29th August 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e., on 30th August, 1999 the detention order has been passed. (Para. 9).

The manner in which the verification has been recorded of the made by these three witnesses for the purpose of section 9(2) shows that the same has been done only as an empty formality in as much as the same witnesses had been called before the detaining authority and the detaining authority had recorded that whatever statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesses so as to express the fear and to invoke the privilege under Section 9 (2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division Bench that it is a case of wrong exercise of power u/S. 9(2) and it is established that in such case the wrong exercise of power u/S. 9(2) adversely affects detenu's right of making an effective representation guaranteed under Article 22(5) of the

Constitution of India. (Para. 9).

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority it must have reasonably sufficient time for the purpose of verification of the facts and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege u/S. 9(2) of the PASA Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999 i.e. on the next day to the date on which the materials were considered by the detaining authority."

In case of Chandrakant N. Patel versus State of Gujarat and Ors. reported in 1994 (1) GLR 761, it has been held by the Division Bench this Court as under:

"The decisions can be said to be a conflict with each other, if the ratio of the decisions is inconsistent. Merely because some observations made in one decision appear to be inconsistent with some observations made in the other decision, it cannot be said that the ratio of the two decisions is in conflict with each other. Before it can be said that the two decisions are inconsistent, it will be necessary to appreciate the context in which such observations have been made and whether they form the ratio of the decisions (Para 2)

There is no inconsistency between the ratio of the Division Bench decision in the case of Bal Krishna (1956(58) BLR 614) and the ratio of the decision of the division bench in the case of Bai Amina (1981 GLR 1186). We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good

law. As stated above, the observations which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects, what can be regarded as proper application of mind to all relevant aspects, what can be regarded as sufficient for the purpose of claiming privilege, and when exercise of privilege can be regarded as bonafide. Whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case. Considering the law relating to preventive detention, the nature of the right conferred on the detenu and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc. of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then, it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the detenu." (para 7)

Looking to the observations made in the aforesaid decisions and also in view of the facts and circumstances of the present case, according to my opinion, the impugned order of detention is required to be quashed and set aside.

For the reasons recorded hereinabove, the petition succeeds and the same is allowed. The order of detention dated 2.1.2001 is vitiated and resulted to quash and set aside. The detenu Anil alias Taklo Manilal Agarwal who has been detained at the Porbandar Jail be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct Service is Permitted.

24.7.2001. (H.K. Rathod,J.)
Vyas